Liang Court Wanisara (Sarawak) Sdn Bhd (previously known as Liang Court Wanisara Sdn Bhd) v Mohamed Shookry Abdul Ghani & Ors

HIGH COURT (KUCHING) — CASE NO 22–194 OF 2010–II
RAVINTHRAN JC
19 MAY 2011

Civil Procedure — Striking out — Application for — Defendant in counterclaim raised claim against two new parties alleging fraud and collusion — Application by new parties to strike out claim — Voluminous affidavits filed in respect of allegations — Whether plain and obvious case for striking out — Whether issues raised could only be determined at trial

The plaintiff in the original action ('Liang Court') sued the president, deputy president and honorary secretary of the Sarawak Club ('club'), a society registered under the Societies Act 1966, in their capacity as principal office bearers as well as on behalf of all other members of the club, for non-payment of monies due under a turnkey contract between the club and the plaintiff. Under the contract, the plaintiff was to develop a golf course at the Universiti Malaysia Sarawak land in Kota Samarahan. The plaintiff pleaded that it had completed the work but the club asserted that the golf course was not completed according to competition standards as was agreed and that there were defects in the work done such as water logging due to defective drainage. The club counterclaimed against the plaintiff for the cost of remedial works, losses due to reduced use of green fees and reduced membership and general damages. In the counterclaim, the club raised a claim against two new parties — a director and the 'controlling mind' of Liang Court, Tan Chong Ing ('TCL'), and golf consultants, E & G Parslo (M) Sdn Bhd ('Parslow'). The club contended that Parslow, as consultants and advisers to the project were negligent and reckless in the performance of their work and had conspired and colluded with TCL to produce certificates of satisfactory completion of the work in order to make false claims upon the club. TCL and Parslow filed respective applications to strike out the claims against them on the grounds, inter alia: (i) that no action lay against TCL as there was no privity of contract between him and the club; (ii) that the allegations of conspiracy and collusion were untrue; and (iii) that under the turnkey contract no contractual relationship existed between the club and Parslow and hence Parslow owed no duty to the club.

Held, dismissing the applications with costs to be taxed:

(1) The special jurisdiction of striking out would only be invoked in plain and obvious cases (see para 7).

(2) The issues in respect of fraud and collusion could not be determined on conflicting affidavit evidence but after full trial (see para 7).

(3) It was not relevant if there was no privity of contract between Parslow and the club. The question was whether the tortious claim in fraud and collusion raised a triable issue or was otherwise completely unmeritorious (see para 7).

[Bahasa Malaysia summary

Plaintif dalam tindakan asal ('Liang Court') menyaman presiden, timbalan presiden dan setiausaha kehormat Kelab Sarawak Club ('kelab'), persatuan yang didaftar di bawah Akta Persatuan 1966, dalam kapasiti mereka sebagai pemegang-pemegang jawatan utama dan juga bagi pihak ahli-ahli lain kelab, kerana tidak membayar wang yang kena dibayar di bawah kontrak serah kunci di antara kelab dan plaintif. Di bawah kontrak tersebut, plaintif dikehendaki untuk membina padang golf di Universiti Malaysia Sarawak di Kota Samarahan. Plaintif memplid bahawa ia telah menyiapkan kerja tetapi kelab mendesak bahawa padang golf tidak siap mengikut standard pertandingan seperti yang dipersetujui dan terdapat kecacatan dalam kerja yang dibuat seperti air bertakung akibat daripada penyaliran yang cacat. Kelab menuntut balas terhadap plaintif untuk kos kerja-kerja pemulihan, kerugian akibat daripada pengurangan kegunaan yuran padang dan keahlian yang berkurangan dan ganti rugi am. Dalam tuntutan balas, kelab membangkitkan tuntutan terhadap dua pihak baru — pengarah dan 'controlling mind' Liang Court, iaitu Tan Chong Ing ('TCL'), dan pakar runding golf, E & G Parslo (M) Sdn Bhd ('Parslow'). Kelab berhujah bahawa Parslow, sebagai pakar runding dan penasihat projek adalah cuai dan tidak hirau dalam prestasi kerja mereka dan telah berkomplot dan berpakat dengan TCL untuk mengemukakan sijil-sijil memuaskan selesai kerja supaya dapat membuat tuntutan palsu ke atas kelab. TCL dan Parslow memfailkan permohonan-permohonan masing-masing untuk membatalkan tuntutan-tuntutan terhadap mereka atas alasan-alasan, antara lain: (i) bahawa tidak terdapat tindakan terhadap TCL memandangkan tidak terdapat priviti kontrak di antara dia dan kelab; (ii) bahawa tuduhan-tuduhan berkomplot dan pakatan adalah tidak benar; dan (iii) bahawa di bawah kontrak serah kunci tiada hubungan kontrak wujud di antara kelab dan Parslow dan maka Parslow tidak mempunyai apa-apa kewajipan kepada kelab.

Diputuskan, menolak permohonan-permohonan dengan kos ditetapkan:

(1) Bidang kuasa khas untuk pembatalan hanya boleh dibangkitkan dalam kes-kes yang nyata dan jelas (lihat perenggan 7).

(2) Isu-isu berkaitan fraud dan pakatan tidak dapat ditentukan atas keterangan afidavit yang bercanggah tetapi selepas perbicaraan penuh (lihat perenggan 7).

(3) Ia tidak relevan jika tidak terdapat priviti kontrak di antara Parslow dan kelab. Soalannya adalah sama ada tuntutan tort dalam fraud dan pakatan membangkitkan isu-isu yang boleh dibicarakan atau sebaliknya langsung tidak bermerit (lihat perenggan 7).]

Notes

For cases on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7478–7481.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

C Evans & Sons Ltd v Spritebrand Ltd and another [1985] 2 All ER 415, CA (refd)

Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd (1989) 47 BLR 139 (refd)

Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] 1 All ER 791, CA (refd)

Victor Ng (Tang & Partners Advocates) for the plaintiff.
Shankar Ram (Thomas, Shankar Ram & Co) for the defendants.

Ravinthran JC:

[1] This is an application by the second defendant, Tan Chon Ing @ Tan Chong Ling (encl 43) and third defendant, E & G Parslow (M) Sdn Bhd (encl 44) to strike out the claim of the plaintiffs (office bearers of Sarawak Club) in the counterclaim action. The first defendant is the plaintiff in the original action. The brief facts may be stated as follows.

[2] The plaintiffs in counterclaim are the office bearers of the Sarawak Club ('Sarawak Club'). They have been sued in contract by Liang Court Wanisara (Sarawak) Sdn Bhd (the plaintiff in the original action). Liang Court Wanisara (Sarawak) Sdn Bhd had entered into a written (turnkey design and build) agreement with Sarawak Club to develop a golf course at the Universiti Malaysia Sarawak ('Unimas') land in Kota Samaharan. The costs of the project was RM12m which was payable by progressive payments of RM250,000 over a period of 48 months. The contract was signed on 1 September 2005. Liang Court Wanisara (Sarawak) Sdn Bhd pleaded that they had completed the works on 30 August 2008 according to the certificate of practical completion issued by the civil engineer and the golf architect. The defect liability period is one year. Liang Court Wanisara (Sarawak) Sdn Bhd alleged that the defects according to the final defects list had been remedied. After submission of the final account, Liang Court Wanisara (Sarawak) Sdn Bhd claimed the

outstanding balance of RM2,256,800. After taking into account other amounts, the Liang Court Wanisara (Sarawak) Sdn Bhd filed a writ for the sum of RM1,956,800 and RM331,730.

[3] In the defence and counterclaim, Sarawak Club pleaded that the golf course was not constructed according to competition standard as agreed. Furthermore, there were various outstanding defects in the completed course such as water logging because of defective drainage system. Sarawak Club has counterclaimed the sum of RM1,354,221 in remedial work, RM480,000 for losses due to reduced use of green fees and RM310,000 for losses due to reduced membership. In addition, the Sarawak Club is also claiming for general damages.

[4] In addition to the counterclaim against Liang Court Wanisara (Sarawak) Sdn Bhd, Sarawak Club has also counterclaim against Tan Chon Ing @ Tan Chong Ling ('TCL') and E & G Parslow Sdn Bhd. Tan Chong Ling is a director of Liang Court Wanisara (Sarawak) Sdn Bhd. Sarawak Club has pleaded that he was the controlling mind behind Liang Court Wanisara (Sarawak) Sdn Bhd. E & G Parslow Sdn Bhd are golf club consultants. They have been appointed by the subcontractor (YYCD Sdn Bhd) of Liang Court Wanisara (Sarawak) Sdn Bhd. Sarawak Club pleaded that E & G Parslow Sdn Bhd, as consultant to the project, had advised on the project and purported to sign the certificate of practical completion. Sarawak Club further pleaded that they were owed a duty of care by E & G Parslow Sdn Bhd who had been negligent and reckless in the performance of their work, especially in issuing the certificate of practical completion. Sarawak Club's case against TCL and E & G Parslow Sdn Bhd is that they conspired and colluded to enable Liang Court Wanisara (Sarawak) Sdn Bhd to produce the interim certificates, the final certificate, the certificate of practical completion, and certificate of making good the defects to make false claims.

STRIKING OUT ACTION

[5] TCL and E & G Parslow Sdn Bhd have in this application applied to strike out the counterclaim of the Sarawak Club against them. The main argument of TCL is that no action lies against him as there is no privity of contract between him and Sarawak Club. He also denied the allegations of conspiracy and collusion with E & G Parslow Sdn Bhd to enable Liang Court Wanisara (Sarawak) Sdn Bhd to make fraudulent claims from Sarawak Club. He also deposed that the certificate of practical completion is not a requirement under the turnkey contract (cl 5.2.3). Liang Court Wanisara (Sarawak) Sdn Bhd as the developer is only required to issue a physical completion notice when the project is completed. As for the claim against E & G Parslow Sdn Bhd, it was submitted that under a turnkey contract there is no contractual

relationship between the employer and the consultant who is appointed by the subcontractor (YYCD Sdn Bhd) of the developer (Liang Court Wanisara (Sarawak) Sdn Bhd). Therefore no duty is owed by E & G Parslow Sdn Bhd to Sarawak Club. The allegations of fraud and collusion were also denied by E & G Parslow Sdn Bhd. Counsel for TCL and E & G Parslow Sdn Bhd cited authorities to argue that in a turnkey contract, the specialist consultant appointed by the developer owes no duty to the employer (see *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791). This means that there is a single point of liability flowing from the developer downwards to the subcontractors. It follows that the consultants have no direct link to the employer (Sarawak Club). He also submitted on the authority of *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd* (1989) 47 BLR 139 that there is no advantage in searching for a liability in tort when the parties are in a contractual relationship. E & G Parslow Sdn Bhd disputed the allegation that Sarawak Club relied on their expertise heavily. They said that there is no special relationship that can give rise to a relationship in tort.

DECISION

[6] To recapitulate briefly the issues in this case, Liang Court Wanisara (Sarawak) Sdn Bhd (plaintiff in the original action) has a claim in contract against Sarawak Club for alleged non-payment of the balance due under the turnkey contract. Sarawak Club (the plaintiffs in the counterclaim) has claimed for defective works against Liang Court Wanisara (Sarawak) Sdn Bhd. In addition, Sarawak Club has a claim against TCL and E & G Parslow Sdn Bhd. TCL was a director of Liang Court Wanisara (Sarawak) Sdn Bhd at the material time. Sarawak Club has alleged that he was the directing mind of Liang Court Wanisara (Sarawak) Sdn Bhd. Sarawak Club seeks to lift the corporate veil and pin personal liability on him. This claim is contractual in nature. However, Sarawak Club has also pleaded a tortious claim in fraud and collusion against TCL and E & G Parslow Sdn Bhd.

[7] It is trite law that the court will invoke the special jurisdiction of striking out only in plain and obvious cases (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). Counsel for Sarawak Club submitted that the certificate of practical completion is applicable because the turnkey standard conditions apply to the contract in question. He also referred to the affidavit evidence in respect of the alleged collusion between Ted Parslow of E & G Parslow Sdn Bhd and TCL to defraud Sarawak Club to procure payments in respect of works that were not done. For this reason, in my opinion, it is not relevant if there is no privity of contract between E & G Parslow Sdn Bhd and Sarawak Club. The question that arises is whether the tortious claim in fraud and collusion raises a triable issue or is otherwise completely unmeritorious. I am mindful that the parties have referred to the

voluminous affidavits in respect of the allegations of fraud and collusion as well as the denial thereof. In my opinion, the issues in respect of fraud and collusion cannot be determined on conflicting affidavit evidence. There is no rule that upon successful lifting of the corporate veil, personal liability cannot be visited upon a director for a tortious act (see *C Evans & Sons Ltd v Spritebrand Ltd and another* [1985] 2 All ER 415). This issue can only be decided after full trial. Similarly, the merit of the tortious claim against E & G Parslow Sdn Bhd can only be determined in a trial. At this stage, there is some affidavit evidence that E & G Parslow Sdn Bhd had a significant role in the golf course project. Whether the allegations of fraud and collusion between TCL and E & G Parslow Sdn Bhd are true is a matter that can only be decided after a trial. I shall therefore dismiss the encls 43 and 44 with costs to be taxed unless otherwise agreed.

Applications dismissed with costs to be taxed.

Reported by Ashok Kumar